United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7173

United States Court of Appeals

For the Second Circuit.

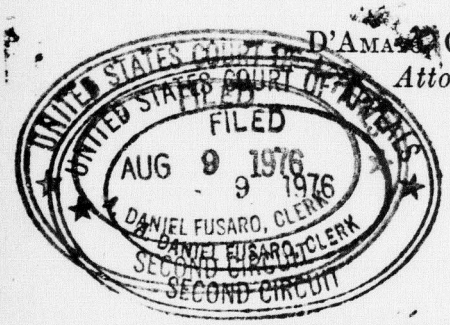
MICHAEL McSWEENEY,
Plaintiff-Appellant,

against

M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief Submitted on Behalf of Defendants-Appellees, M. J. Rudolph Co., Inc. and M. J. Rudolph Corp.



D'AMATO, COSTELLO & SHEA
Attorneys for Defendants-Appellees M. J. Rudolph Co., Inc., and M. J. Rudolph Corp.
116 John Street
New York, N. Y. 10038
(212) 791-1500

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

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In this action the trial court dismissed the causes of action in negligence asserted by plaintiff against the Rudolph companies, hereafter "Rudolph," and all causes of action against the co-defendants, but permitted the case to go to the jury on the issue of seaworthiness insofar as Rudolph was concerned. The jury returned a verdict for defendant. It is submitted that the court should have dismissed the suit totally on motion at the close of the plaintiff's case, and that the judgment should be affirmed.

Facts.

Many of the facts which plaintiff devoted extensive effort to proving were admitted from the outset of this litigation. M.J. Rudolph Corp. operated a floating crane owned by M.J. Rudolph Co., Inc., and M.J. Rudolph Corp.

employed the plaintiff as oiler aboard the crane. For the sake of simplicity at trial, and with the consent of the undersigned, the companies were dealt with together as "Rudolph" and it was conceded that defendant Rudolph owed to plaintiff the obligation to furnish a seaworthy vessel and was subject to suit under the Jones Act. In that respect, plaintiff had recovered maintenance and cure prior to the trial, and was treated as a seaman, as claimed by plaintiff and conceded.

On November 14, 1973, plaintiff reported for work aboard the R-5, a floating crane owned by Rudolph which was located at Pier 6 in Brooklyn. On the previous day he had worked aboard another crane owned by Rudolph. The cranes had no motive power of their own, and had to be towed from place to place.

He reported for work at about 7:30 a. m., and sometime before 8 a. m. noticed that a container which weighed twenty-five tons was being driven on to the pier (32).*

At that time the crane was rigged with a two-part block. A two-part block consists of a rather substantial pulley with one wheel. It is referred to as a two-part block because the cable goes to the pulley and away from it, and the portion of the cable going to the pulley is referred to as a part and the portion going away from it is referred to as a part.

When rigged with a two-part block, the crane was capable of lifting eighteen tons and, in order to lift a twenty-five-ton container, it was necessary to change the blocks. Lifting a twenty-five-ton container was done with a four-part block, which is a pulley with two wheels, rigged

*References are to the pagination of the transcript as reproduced in the appendix.

so that the cable has four parts. As so rigged, the equipment has a greater mechanical advantage, but of course works more slowly.

There were in the employ of Rudolph, assigned to operate the crane, two men, the engineer and plaintiff, the oiler (82). That complement was established by union contract and pertained even to cranes larger than R-5 (419). It was the usual complement that had been used in operating the cranes for some time and is used to this day (82, 419).

Each crane was provided with a two-part block and a four-part block, and it was normal to change from one block to another (46, 85). There was no evidence in the record as to what precise order had been made with respect to the lifting capacity of the crane. It was testified by Mr. Rudolph that he did not know what rigging capacity had been ordered, and there is no testimony in the record, as to the capacity which actually had been ordered. The crane had been used the day before on the same pier, loading the same vessel, rigged for a maximum of eighteen tons. It was normal for the crew to change from one block to the other (46).

It was necessary to make the change on the pier, inasmuch as the boom of the crane, if lowered to the horizontal, extended beyond the barge of the crane. Accordingly, plaintiff hooked the unrigged four-part block to the two-part block and directed the crane operator to lift it from the deck of the barge and bring it over the pier. The operator lifted it up about 90 feet, rotated the crane over the pier and lowered the boom so that the four-part block was about five feet above the pier. Thereafter, during the times relevant to this appeal, it is uncontested that the crane operator did nothing more by way of operating the crane.

It was necessary that the four-part block be lowered in such a way that it could be reeved with the crane's cable. This did not require lifting or pulling, but merely required that someone see that the block was pointed in the right direction when landed.

Plaintiff contended and testified that, prior to positioning the block as described above, an employee of ITO, the stevedore and terminal operator, referred to as Joe Chuck, addressed abusive language to him on account of the fact that the crane was not ready to lift the twenty-five-ton container. Plaintiff also testified that another employee of ITO, "Joe the Harbor Master," volunteered to help him do the work necessary to change the blocks. It was plaintiff's testimony that when he returned from the deck to the pier, to position the block, he believed that Joe the Harbor Master was standing in back of him. The plaintiff placed his hands on the block, without requesting that Joe the Harbor Master do anything, and without any activity on the part of the crane operator, the block twisted and lurched forward and to the left, causing him to have a severe pain in the back and to fall over on to the pier. He did not know what caused the block to twist and lurch, but testified that the cable must have twisted which is not a common occurrence, but something that he had seen in the past (134). It was crystal clear from his testimony that while this was going on the crane was not being operated.

It was the plaintiff's position that, on that morning, while he was preparing to do his work he noted that there was no tag line aboard the vessel, and that in the ordinary course of events he would use a tag line to position the block. Any light piece of line would suffice as a tag line (86).

There usually were tag lines aboard Rudolph barges (96-7, 133), and there is no evidence in the record as to how long it was claimed the R-5 was without a tag line prior to 7:30 a. m. on November 14.

It was his testimony that, if one is doing the job by himself, one should have a tag line (125), but that without a tag line "one or two additional men" were needed to do the job.

It apparently was his contention that he usually had assistance from pier personnel, i. e., longshoremen, in doing the work.

It should be clearly stated at this point that plaintiff produced no expert testimony by anyone other than plaintiff as to how the job should be done, or what adverse results could be anticipated if the job was done improperly.

Further, his testimony as to the existence of a tag line was contradicted in his examination before trial. In the examination before trial he testified (88) that "sometimes I'll put a line on it." When asked why he did not put a line on it in this case he said "because this guy Chuck was hollering and screaming and ranting and raving and I was rushing." When asked how long it takes to put a line on it he stated "Well you have to, you know, go under the deck and get a line, you know, and put it on." At trial, he acknowledged having so testified, except that he stated that the word "under" should have been transcribed "on to."

His testimony as to the happening of the accident was seriously contradicted by a statement which was marked "defendant's exhibit A" in evidence. In that statement he had said only (102), "While pulling the block I felt

my back give way and I fell to the dock. I remained on the dock until they placed me on a pallet and moved me inside the building awaiting the ambulance from Long Island College Hospital." That statement was made shortly after the accident, to a representative of the defendants Rudolph, and he did not tell that representative that the block twisted and lurched (104).

Plaintiff testified that as he was attempting to position the block and, when he had his accident, Joe the Harbor Master probably was standing behind him (128), and plaintiff did not know if he was going to attempt to help him. The plaintiff also testified that Joe had previously said that he was going to help plaintiff. However, plaintiff did not ask for any assistance in the positioning of the block. Joe the Harbor Master never withdrew his offer to help—he just did not help (120).

There was no testimony on behalf of the plaintiff as to what standard of care or requirements of equipment existed, except the testimony of plaintiff. It was his view that in the daily routine of operating a crane no more than two men were needed (108) as far as oiling and greasing was concerned. If one did not have help in landing a block, he considered that a tag line should be used (125). Without tag lines, one or two additional men should be used. On the other hand, he testified that, if one did have a tag line, one person could land the block (133).

After plaintiff rested, the court dismissed the cause of action sounding in negligence against the defendants Rudolph, but submitted to the jury the question of unseaworthiness. The charge is fully reported in the appendix, and in essence was to the effect that plaintiff was a seaman, entitled to a warranty of seaworthiness which imposed upon the owner of the vessel the duty to furnish a vessel reasonably fit for its intended purpose or use.

That duty extended to all parts of the vessel and was continuing and nondelegable. It was absolute liability, imposed even though the vessel owner may have been free from fault and even if the vessel owner exercised reasonable care.

More specifically, the court charged that, if there was an inadequate crew under the circumstances or that a tag line was required under the circumstances, that was sufficient to find that an unseaworthy condition existed. After charging on causation and damages the court repeated and amplified its instructions concerning the tag line.

After some deliberation the jury requested a portion of the charge be reread and that seaworthiness be redefined and the court instructed that, if the vessel was unseaworthy either because of the alleged lack of tag line or inadequacy of the crew (543), it would be necessary to go on to consider whether that unseaworthiness was the cause of plaintiff's injuries. Nonetheless, the jury returned a verdict in favor of Rudolph.

POINT I.

It was not error to dismiss negligence action against Rudolph.

A

No cause of action in negligence was made out against the defendants Rudolph

It appears to be plaintiff's contention that he was entitled to have the issue of Rudolph's negligence presented to the jury. We agree that the Jones Act authorizes

plaintiff to recover for any negligence of Rudolph that brought about his injuries, but, even under the Jones Act, some evidence of negligence is required to avoid dismissal. *Pedersen v. Morris & Cummings Dredging Co.*, 274 F. 2d 606 (2d Cir. 1960).

It was clear that it was not negligence to require that the block be changed. The vessel was equipped with two blocks, sometimes one being used and sometimes the other, depending on the work that was to be done. It was a normal occurrence to change the block. Plaintiff devoted a great deal of time to proving and attempting to introduce evidence that all the defendants knew or should have known that there would be a requirement on November 14 for a rigging capable of lifting twenty-five tons. It was not disputed that such a requirement existed and could have been anticipated, at least by the vessel owner and the stevedore, although the record indicates that Rudolph had no record or recollection of what order was made. However, it is submitted that there was no negligence in furnishing the crane rigged as it was, even if there was knowledge of the requirements of the day's work. The record is utterly devoid of any testimony or other evidence that it was negligence to have the crane at its berth with an inadequate rigging. It was the normal job of the crew to change the rigging to satisfy the requirements of the work at hand (313). Accordingly, if plaintiff was to make out a negligence case, he was required to show that Rudolph was negligent in furnishing him with the wherewithal to perform his task. This was referred to in argument as failure to furnish a safe place to work.

Accepting the plaintiff's testimony as that of a qualified expert, he testified clearly that he could have done the job safely if he had a tag line (133). He also testified that he could have done it safely if he had one or two men to help him, even without a tag line.

There is no evidence whatever as to how long the R-5 was without a tag line. In fact, the evidence that there was no tag line was extremely weak and severely contradicted. The plaintiff testified that he did not go into the cabin where equipment was stored for the specific purpose of looking to see if there was any rope there (95). He only went into the cabin to look for his grease gun and oil, and this occurred prior to learning of a need for a tag line (94).

Accordingly, even construing plaintiff's testimony most favorably, to wit, that a tag line was necessary and there was none aboard the vessel, he made no attempt to prove that Rudolph had notice of the condition or an opportunity to correct it. *Kleveland v. United States,* 345 F. 2d 134 (2d Cir. 1965).

It is clear from plaintiff's testimony that tag lines usually are found aboard the vessels, and if he had a tag line there would have been no unsafe condition. Accordingly, there was no proof of negligence.

Further, it appears to be plaintiff's contention that it was customary for longshoremen to assist in performing the task involved.

Plaintiff himself was not aware that Joe the Harbor Master would not assist, and it requires a strained reading of his testimony to even draw the conclusion that Joe the Harbor Master was unwilling to assist (130). Further, the plaintiff showed no evidence that anyone from Rudolph was aware that the longshoremen would not assist. As pointed out by the court in argument on the motion, it appears that Joe the Harbor Master was in back of plaintiff, and plaintiff never turned around and told him what to do (181-2). Accordingly, it is clear that there was no

reason to suspect that Rudolph was aware of plaintiff's alleged need for assistance.

Accordingly, plaintiff's claim of negligence fails on two separate counts, either one of which was adequate to dispose of it, in that there was no evidence that Rudolph knew or should have known of the alleged lack of tag line or the alleged lack of assistance.

B

Plaintiff was not prejudiced by the dismissal of the negligence cause of action against Rudolph

It is difficult indeed to understand why plaintiff's counsel desired to proceed against Rudolph for negligence. The only evidence of any sort of factual claim on which it was attempted to ground liability was plaintiff's own testimony that a tag line that was required for the work was not available and that he had inadequate help to do the work. In a word, he was claiming that Rudolph failed to furnish him with a vessel adequately equipped and manned. This is fairly well admitted in the argument on the motion, at which the court insisted that plaintiff's counsel apprise it of what the claim of negligence was. That argument began on page 393 of the transcript when counsel for Rudolph indicated to the court that he did not believe that plaintiff was relying on negligence. Finally, on page 398, counsel for plaintiff indicated that the negligence consisted of a failure to provide a safe place to work and, when asked what was unsafe about the place to work, counsel for plaintiff stated that it was brought about by the lack of gear, by the lack of equipment, by the lack of complement of crew. He also stated on page 399 that there was a failure to provide proper supervision.

Taking first the point of lack of supervision, it was testified that the proper normal complement was two men (108) and that the job of changing the blocks had been done many times. The court must assume that plaintiff is somewhat expert in the field, because it is his testimony and his testimony alone that was used to establish the standards of conduct that were relied on by plaintiff in attempting to make out a prima facie case. He never testified that he required supervision, and there is no evidence that this particular task was ever done under the supervision of anyone more skilled than plaintiff. Accordingly, we appear to be left with the claim that it was error not to submit to the jury the question whether Rudolph was negligent in failing to provide a vessel equipped with a tag line and with an adequate crew.

The charge that plaintiff now states he should have received would have differed from the charge that he had received only to the extent that the court would have imposed upon plaintiff the additional burden of satisfying the jury that Rudolph knowingly or negligently breached the duties which the court, in fact, did charge the jury. Presumably, plaintiff then would have insisted on a charge on the seaworthiness issue which then would have relieved him of the duty of proving fault. It is logically impossible for plaintiff to contend that he suffered prejudice by being denied the opportunity to convince a jury that Rudolph was negligent in providing him with a defective vessel when he was unable to convince a jury that Rudolph provided him with a defective vessel at all.

Specifically, the only claims made against Rudolph were that certain conditions existed, to wit, a lack of tag line and a lack of an adequate crew. The court presented to the jury the question of whether either one of these conditions prevailed, and instructed the jury that if either of those conditions prevailed, and was the cause of plaintiff's injuries, the plaintiff was entitled to damages.

It is respectfully submitted that this appellate court is bound by the finding of the jury that the defective conditions complained of by plaintiff either did not exist, or did not cause any injuries.

C

The court should have dismissed all of the causes of action against Rudolph because there was no proof of causal relationship between the legal faults complained of and the injuries sustained

In the posture of the case, as it existed when Rudolph moved for dismissal, which was not changed in any way by evidence thereafter, there was no proof that if two or three men were holding onto the block and assisting plaintiff in whatever he was doing that it would not have lurched and twisted. Counsel for Rudolph attempted to go into this issue on cross examination, and inquired of plaintiff what assistance could have been rendered that would have prevented his injuries (187). Plaintiff said that whoever assisted him would put his hands on the block and hold onto it and that the chance of the block twisting or lurching might have been lessened (188). Rudolph's counsel asked if he ever made any studies of physics and how a fifteen-hundred-pound load acts when suspended from a cable, and plaintiff's counsel objected on the grounds that Mr. McSweeney was not an expert on physics. No one else testified whether one or two other men holding onto the block would have lessened its lurching and, if so, to what degree. There was no testimony as to how much they could have lessened it. It was mere speculation on this record to assume that assistance could have prevented the injuries.

POINT II.

Plaintiff received a fair trial.

It is necessary now to turn to some of the points raised by plaintiff in the *ad hominem* portion of the brief.

Plaintiff's counsel offered a lengthy contract in evidence, which he had never read, on the ground that there might have been something relevant in it. It was not rejected by the court, but the court suggested that plaintiff's counsel review it first to explore its relevance. It is the contention of plaintiff on this appeal that thereafter it was all but forgotten, but we think it fair to comment that it was completely forgotten. Of course, the existence of the contract, the stevedoring contract between ITO and the ship owner was never contested, and, in fact, it appears that it was received in evidence at page 386, although no one ever suggested that it had anything to do with the case.

Counsel contends that he was prejudiced by the awarding of extra challenges to the defendants because of the cross-claims. The challenges were awarded in the robing room outside the hearing of the jury and the defendants did not use any challenges at all.

Most of the other points raised in Point III of plaintiff's brief refer to the relationship of plaintiff and ITO and the vessel owner, which is not directly relevant insofar as Rudolph is concerned. Nonetheless, it is submitted that the relationship did come out, and it was clear to all present that ITO did have the authority to direct that the block be changed, but that the manner in which the block was changed was not the responsibility of ITO.

Insofar as the reading of the depositions is concerned, it began on page 193, at which time plaintiff's counsel began reading the whole testimony of Joseph Manguilo, given sometime previous on behalf of ITO. The court indicated that it had a feeling that he was going to read the whole deposition without selecting those portions which were relevant and counsel for plaintiff said that it "may well be, Your Honor" (199). That procedure continued, despite the court's request that irrelevant matter be omitted in reading the deposition.

Neither at trial nor in the brief was it indicated what plaintiff was trying to prove that was not well proven and conceded. For the most part one feels that the issues involve ITO and the vessel rather than Rudolph. Further the court quite often permitted inconclusive answers, for instance "possibly" on page 225.

POINT III.

The arguments made in Points IV and V of the appellant's brief are adequately dealt with by the jury's verdict.

POINT IV.

The failure of the court to charge that an adverse inference can be drawn from the failure of the defendants to call Dr. Balensweig and Dr. Moldaver is not reversible error.

It is apparent that whatever evidence the court admitted and whatever charges it made to the jury on the issue of damages are not relevant on this appeal, inasmuch as the

findings of the jury on liability precluded it from considering evidence of damages. Nonetheless, since this point appears to be part of the *ad hominem* argument, a word of explanation is in order. Prior to trial plaintiff submitted the reports of two physicians, his orthopedist who testified at trial that plaintiff had an injury to a disc, and the report of a neurologist who had examined plaintiff as a consultant to the orthopedist for purposes of treatment, who felt that there was no injury to a disc, and in fact made some comments that were unfavorable insofar as the plaintiff was concerned.

The defendants' examining orthopedist, Dr. Balensweig, indicated in his report that he could not reach any conclusions and he suggested a neurological examination. The neurological examination was conducted by Dr. Moldaver, who indicated that he did not feel that plaintiff had a disc problem.

Counsel for Rudolph represented to the court that Dr. Moldaver had had a serious heart attack and had requested that he not be called to testify unless it was absolutely necessary.

The court reviewed all four reports, and noted that the only one that was favorable to plaintiff's position was the report of the physician who had testified at plaintiff's behest. The reports of the defendants' physicians were, in view of the court, essentially neutral, and the report of plaintiff's treating neurologist, submitted by plaintiff's counsel in pretrial proceedings, was adverse to plaintiff's position. The court suggested that, if it was going to charge on inference, it would charge as to all of the doctors. That was not satisfactory to plaintiff. Accordingly, the court felt that it would be unfair to charge such an in-

ference, inasmuch as if all of the medical proof had been put before the jury it would have seriously weakened the plaintiff's case.

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

D'AMATO, COSTELLO & SHEA,
Attorneys for Defendants-Appellees,
M. J. Rudolph Co., Inc., and M. J. Rudolph Corp.,
116 John Street,
New York, N. Y. 10038

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Corcoran + Brady
Attorneys for Plaintiff Appellant

Services of three (3) copies of
the within is
hereby admitted this 6th day
of August , 1976

Kirlin, Campbell & Keating
Attorneys for Yamashita

Services of three (3) copies of
the within Brief is
hereby admitted this 6th day
of August , 1976

Jewel McLaughlin + Bruhman
Attorneys for Continental Terminal Operating Co. Inc.